FILED
OCT 4 1988
ALEXANDER L. STEVAS,
CLERK

No. 88-[illegible]

In The

Supreme Court of the United States

October Term, 1988

ALBERT A. JONES, A MINOR CHILD; BRIDGET JONES,
A MINOR CHILD, BY THEIR MOTHER AND NEXT FRIEND,
ALBERTINE JONES; BARBARA L. JONES,

Petitioners,

v.

RICHARD S. SCHWEIKER,
SECRETARY OF HEALTH AND HUMAN SERVICES.

MARCIA SIMMS,
A MINOR BY HER NEXT FRIEND,
SHEILA SIMMS,

Petitioners,

v.

RICHARD S. SCHWEIKER,
SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

SUPPLEMENTAL BRIEF

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P.L. No. 96-452, 94 Stat. 1995 1

No. 82-25

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SUPPLEMENTAL BRIEF

A RECENT DECISION OF THE FIFTH CIRCUIT HAS ADDED TO THE EXISTING CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS

In their Petition for Certiorari, filed on July 2, 1982, petitioners cited Cox v. Harris, 486 F.Supp. 219 (M.D. Ga. 1980), appeal docketed, No. 80-7430 (5th Cir., June 6, 1980). At that time Cox had been submitted but not yet decided. Cox has now been decided by the Court of Appeals for the Fifth Circuit and is reported at Cox v. Schweiker, 684 F.2d 310 (5th Cir. 1982).[1/] The sole purpose

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1/ Cox was actually decided by a panel of the new Eleventh Circuit. However, since it was apparently "submitted for decision" within the meaning of the Fifth Circuit Recognition Act of 1980, P.L. 96-452, 94 Stat. 1995, it was decided as a "Former Fifth Circuit Case." 684 F.2d at 310. As a result, Cox is binding precedent in the Fifth Circuit. It is unclear but it may also be viewed as binding in the Eleventh Circuit as well. C.f., Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981).

of this Supplemental Brief is to advise the Court of the decision in Cox.

Certiorari jurisdiction in this case was based on the existence of a conflict in the Circuit Courts of Appeals. As noted in the Petition for Certiorari, the Fourth Circuit's opinion in this case was contrary to two decisions of the Eighth Circuit dicta in Mathews v. Lucas, 427 U.S. 495, 515, n. 18 (1976) and four reported district court cases. See, Petition for Certiorari at 10-21. The Fifth Circuit has now joined these authorities by holding, in Cox, that an unconstitutional state intestate succession statute cannot be employed to bar an otherwise eligible illegitimate child from receiving Social Security surviving child's benefits.

In Cox, the child's father died while domiciled in Georgia. The Admini-

strative Law Judge found as a fact that the wage earner was the child's father but nevertheless denied the child benefits. Judge Tuttle, writing for the Fifth Circuit, found that the relevant Georgia statute[2/] was "unconstitutional under the principles enunciated by the United States Supreme Court in recent cases." 684 F.2d at 323. This conclusion required the court to confront the precise issues raised in the Petition for Certiorari. As phrased by Judge Tuttle the question was: "whether under the Social Security Act, the question

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2/ The Georgia statute had been amended in 1980 well after the child's father had died. The court did not apply the new statute to the child's case because the new statute contained no directives requiring retroactive application and because the Georgia Constitution expressly forbid retroactive interference with vested rights. Cox, 684 F.2d at 319.

of the constitutionality of a state's intestacy law is even relevant to the assessment of eligibility for survivor's benefits." 684 F.2d at 317. Unlike the Fourth Circuit in Jones, the Fifth Circuit answered this question in the affirmative. The court specifically held that "such law as would be applied . . . by the courts of the State" as used in 42 U.S.C. §416(h)(2)(A) included the United States Constitution. 684 F.2d at 317-8. The court reasoned:

> The state courts of Georgia, no less than the courts of any other state, and of course no less than the federal courts, must adhere to the same fundamental constitutional principles by virtue of the Supremacy Clause of the federal constitution. We must therefore assume that in determining the rights of citizens under the particular state law, any court, state or fed-

> eral, must give effect to federal constitutional principles where relevant.

684 F.2d 317-8 (footnotes omitted). Since the state statute, as incorporated into the Social Security Act, was unconstitutional and since the court was "bound to eradicate the constitutional flaw" the child was held to be entitled to Social Security benefits. 684 F.2d at 324.

The Fourth Circuit in Jones specifically reached the opposite result, finding that it simply made no difference whether or not the state's intestate succession statute was unconstitutional. [App. 28A-29A]. The Cox case thus adds to the existing conflict in the Circuit Courts of Appeals on the

precise point raised in the Petition for Certiorari and provides a further reason for granting certiorari in this case.

Respectfully submitted,

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